

COURT OF APPEAL

24th September, 1996. 170.

Before: Sir Godfray Le Quesne, Q.C., (President)  
 Sir David Calcutt, Q.C., and  
 Miss E. Gloster, Q.C.

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In the matter of the Representation of Louis Emile Jean

Between	Louis Emile Jean	Representor
And	Colin Douglas Murfitt	First Respondent
And	Murco Overseas Properties Limited	Second Respondent
And	The Viscount	Third Respondent

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**Applications by the First Respondent:**

- (1) for leave to appeal against so much of the Order of the Royal Court (Samedi Division) of 10th June, 1996, as refused the First Respondent's application to have the question of ownership of the shares in Murco Overseas Properties Limited determined as a preliminary issue;
  - (2) for the Court to declare that all costs to date in this action are on a taxed and not on a full indemnity basis; and
  - (3) for the Court to stay all action relating to taxation of costs, until such time as the Judicial Committee of the Privy Council shall have determined the First Respondent's application for special leave to appeal to Her Majesty in Council from the Judgment of the Court of Appeal of 18th April, 1996; and if such special leave is granted, until determination of the appeal.
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The First Respondent in person.  
Advocate J. D. Kelleher for the Representor.

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JUDGMENT

5 GLOSTER, J.A.: There are three applications before this Court made by the First Respondent, Colin Murfitt ("Mr. Murfitt"), who has appeared in person before us as he did in the Royal Court. The first application is for leave to appeal against so much of the Order of the Royal Court dated 10th June, 1996, as refused Mr. Murfitt's application to have the question of the beneficial ownership of 2,500 shares in Murco Overseas Properties Limited ("the Company") determined as a preliminary issue.

10 The second application is for a declaration by this Court that all costs to date ordered against Mr. Murfitt should be paid on the standard basis and not on a full indemnity basis.

15 The third application, as developed in the course of argument by Mr. Murfitt, was for a stay of all taxation of costs awarded against Mr. Murfitt, and also for a stay of any enforcement of such costs until after the Judicial Committee of the Privy Council shall have determined Mr. Murfitt's application for special leave to appeal to Her Majesty in Council from the Judgment of the Court of Appeal dated 18th April, 1996, and, if such special leave is granted, until determination of the appeal.

25 By his Representation filed in the Royal Court in December, 1993, the Representor, Louis Emile Jean ("Mr. Jean"), sought pursuant to Article 155 and 141 of the Companies (Jersey) Law 1991 (as amended) ("the 1991 Law"), the winding up of the Company and the appointment of a liquidator, together with certain consequential relief, including, in particular, the sale of the Company's principal asset, a site at Braye in Alderney. Under Article 155 of the 1991 Law a company may be wound up by the court if the court is of the opinion that it is just and equitable that the company should be wound up. An application to the Court may be made *inter alia* by a director of the company or by any member of the company. Under Article 141 of the Law a member may apply to the Court for the relief set out in Article 143 on the grounds that the relevant company's affairs are being, or have been, conducted in a manner which is unfairly prejudicial to the interests of its members generally, or of some part of its members, including at least the applicant member himself; or that an actual or proposed act or omission is, or would be, so prejudicial. It is relevant to note that Article 141(2) of the Article provides that the provisions of the Article apply to a

person who is not a member of a company, but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company and that references to a member or members are to be construed accordingly.

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In this context it is also relevant to note that Mr. Jean's Representation alleges that Mr. Jean is the beneficial owner of 2,500 of the 5,000 issued shares in the Company (see paragraph one of the Representation) and that the remaining 2,500 shares in the Company are beneficially owned by Mr. Murfitt. There is thus no specific allegation as such that Mr. Jean is a member of the Company. However the Representation does allege that Mr. Jean and his late wife together purchased 2,500 shares in the Company from Mr. Murfitt in 1977 and that the shares were transferred into the joint names of Mr. and Mrs. Jean shortly after the purchase of the site in 1977. The grounds for the relief sought in the Representation, in general terms, are based on allegations that the Jeans and Mr. Murfitt were involved through the Company in a partnership for the development of the site, that the partnership between Mr. Murfitt and the Jeans has completely broken down and that Mr. Murfitt is conducting, or attempting to conduct, the business of the Company in a manner that is unfairly prejudicial to Mr. Jean.

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Importantly it appears from written submissions made by Mr. Murfitt to the Royal Court on 10th June, 1996, and from what he said in this Court, that there is no dispute that Mr. and Mrs. Jean were registered as members in the Company's register as holders of 2,500 shares from about October, 1977; that in June 1994, because of an earlier dispute, Mr. and Mrs. Jean transferred three shares to Olec Nominees Ltd and three shares to Olec Securities as nominees for Mr. and Mrs. Jean, and that after Mrs. Jean's death in 1993, Mr. Jean remained the sole registered holder of 2,494 shares, the remaining six shares being held by nominee companies. Dr. Kelleher, advocate for Mr. Jean, has also informed the Court that the 1995 annual return shows Mr. Jean as the registered holder of 2,494 shares and Mr. Murfitt as the holder of 2,500 shares.

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By his answer to the Representation filed on 11th February, 1994, Mr. Murfitt admitted the allegation in paragraph one of the Representation that Mr. Jean was the beneficial owner of 2,500 shares in the Company and also admitted that the partnership between Mr. Jean and himself had indeed broken down. However, by way of defence to the Representation, Mr. Murfitt contended that by a *séparation des biens* agreement, allegedly signed by Mr. and Mrs. Jean on 18th February, 1991, the parties had dissolved their partnership and reached agreement about the equitable division of the property, including the site, and that accordingly the Representation should be dismissed on this ground. In his reply dated 26th May, 1994, Mr. Jean denied that the alleged *séparation des biens* agreement had been signed by him or his late wife. By

an Act of the Royal Court dated 7th March, 1995, it was ordered by consent that the issue as to whether the alleged *séparation des biens* agreement had indeed been signed by Mr. Jean and his late wife be tried as a preliminary issue.

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On 17th May, 1995, following the trial of that issue, the Royal Court held that the alleged signatures of Mr. and Mrs. Jean on the *séparation des biens* were not genuine and had been forged and ordered Mr. Murfitt to pay Mr. Jean's costs of the preliminary issue hearing on a full indemnity basis. By notice of appeal dated 26th May, 1995, Mr. Murfitt appealed against the Judgment of the Royal Court, including the Royal Court's Order that he should pay Mr. Jean's costs on a full indemnity basis. That appeal did not come on for hearing in this Court until April, 1996, when the Court also heard certain interlocutory applications by Mr. Murfitt *inter alia* for a stay of the proceedings on the grounds of the alleged disability of Mr. Jean, for an Order that any further action by Mr. Jean should be taken only by a guardian to be appointed to act on his behalf by the Court of Alderney (where Mr. Jean lives), and for an order for discovery of a certified copy of Mrs. Jean's will.

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On 18th April, 1996, this Court not only dismissed those interlocutory applications but also dismissed the substantive appeal by Mr. Murfitt against the Royal Court's Judgment in relation to the alleged *séparation des biens* agreement. This Court also dismissed Mr. Murfitt's appeal against the Royal Court's indemnity costs Order in relation to the trial of the preliminary issue, and refused Mr. Murfitt's application for leave to appeal to the Privy Council in respect of that issue. The Court also ordered that the costs of the Representor of, and incidental to, that appeal be paid forthwith Mr. Murfitt after taxation and refused his application that the costs should be paid out of the assets of the Company and that the order for costs should not be enforced without the prior leave of the Court.

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Having failed on the first preliminary issue, Mr. Murfitt then appears to have applied to the Royal Court on 10th June, 1996, first for an order that he be at liberty to file an amended answer to Mr. Jean's Representation and second for a direction that the question of the beneficial ownership of the Jeans' shares be determined as a preliminary issue. There appears however to have been no summons before the Royal Court on that date specifically seeking the direction of a preliminary issue.

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The grounds of Mr. Murfitt's application before the Royal Court (and indeed before this Court) were that he was proposing, by his amended reply, to put in issue the whole of the beneficial ownership of the Jeans' shares in order to defeat the Representation for the winding up of the company. Both before the Royal Court, and this Court, he asserted that, for a number of reasons, Mr. Jean never has been, or alternatively is no longer,

the beneficial owner of the 2,500 shares and therefore is not entitled to the relief sought in the petition. Accordingly Mr. Murfitt contends that this issue should be determined by the Royal Court as a preliminary issue before the trial of the petition.

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The reasons relied upon by Mr. Murfitt both before the Royal Court and this Court were:

1. that because, following his wife's death, Mr. Jean executed two transfer forms purporting to transfer 1,247 shares to each of his two sons, Louis Jean, junior and François Jean (which transfers incidentally Mr. Murfitt, as co-director, has refused to allow the Company to register), Mr. Jean is no longer the beneficial owner of the shares, although he remains the registered holder of 2,494 shares;
2. that Mr. Jean may at all times have merely been Mrs. Jean's nominee and for that reason has no beneficial interest in the shares and has never done so;
3. that, even if the shares were transferred under her will to her two sons, that itself may have been a fraud on her other children who have, so Mr. Murfitt contends, rights under Alderney law to share in her estate, whether she died testate or intestate.

On 10th June, 1996, the Royal Court refused Mr. Murfitt's application to have the issue of the beneficial ownership of the Jeans' shares tried as a preliminary issue. This Court has not been told by either Dr. Kelleher or Mr. Murfitt of the reasons, if any, given by the Royal Court for its refusal to grant Mr. Murfitt's application to have the issue as to the beneficial ownership of the Jeans' shares tried as a preliminary issue.

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On the same date the Royal Court adjourned Mr. Murfitt's application for discovery of Mrs. Jean's will *sine die* and then, or shortly thereafter, the trial of the action was fixed for 21st October, 1996, with a two to four day time estimate. On 21st June, 1996, pursuant to leave given by the Royal Court on 10th June, Mr. Murfitt amended his answer *inter alia* to deny the allegation in paragraph one of the Representation that Mr. Jean was the beneficial owner of 2,500 shares in the company. In Mr. Jean's amended reply filed on 4th July, 1996, Mr. Jean repeated the averment in paragraph one of the Representation that he is indeed the beneficial owner of 2,500 shares in the company.

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Since the hearing before the Royal Court on 10th June, 1996, a number of events have occurred upon which Mr. Murfitt seeks to rely before this Court in support of his application for leave to appeal against the the Royal Court's refusal to direct the determination of a second preliminary issue. The first and main

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development, Mr. Murfitt submits, is that he has now, as a result of certain proceedings in Alderney, been provided with a full copy of Mrs. Jean's wills of realty and of personalty. The latter will appointed Mrs. Jean's two sons, Louis junior and François, the executors of the will and contained a gift of the whole of Mrs. Jean's beneficial interest in the share capital of the Company to her two sons. This Mr. Murfitt seeks to contend clearly demonstrates that Mr. Jean never had any interest in the 2,500 shares and that Mrs. Jean must at all times have had the total beneficial interest therein. I do not accept the submission that the wording of Mrs. Jean's will of personalty supports Mr. Murfitt's proposition but in any event this is a matter for argument at trial.

The second event which has occurred is apparently that the costs of the first preliminary issue hearing have now been taxed or are in the course of being taxed.

Thirdly, in a letter to Mr. Murfitt dated 4th September, 1996, Dr. Kelleher, advocate for Mr. Jean stated that he was quite happy for the issue of the beneficial ownership of the Jean shares to be treated ahead of the petition by the Royal Court on 21st October, although Dr. Kelleher stated that he was not willing to accept that the issue should be determined at a separate hearing.

Fourthly, Dr. Kelleher, on behalf of Mr. Jean, has now taken out a summons for leave to join the two executors of Mrs. Jean's will of personalty, that is to say Mr. Louis Jean junior and Mr. François Jean, as additional Representors to the proceedings and has informed this Court that it is his intention to apply for probate of the will sometime this week in Alderney. We are informed by the parties that this summons is due to be heard in the Royal Court next week.

Fifthly, Mr. Murfitt himself has taken out a summons in effect to strike out the Representation on a summary basis on the alleged grounds that Mr. Jean was not in any position to bring the Representation because he did not beneficially own the 2,500 Jean shares. In the alternative, by this summons Mr. Murfitt seeks an order that all actions be stayed until the Alderney Court has determined the true ownership of the 2,500 shares in the Company.

Mr. Murfitt submits to this Court that, in all the circumstances, and in particular given the acceptance by both parties that the beneficial ownership of the 2,500 shares has to be resolved, it is highly desirable in the interests of saving costs that this issue should be determined as a preliminary issue before the hearing of the petition. He contends that the issue is a straightforward matter, that will be determinative of the petition, and that no amendment will be allowed to join the two Jean sons without an order that Mr. Murfitt's entire costs of the petition to date are paid.

In my judgment the Royal Court was entirely correct to refuse Mr. Murfitt's application for the determination of a further preliminary issue at this late stage and nothing which has occurred since 10th June, 1996, affects the Royal Court's conclusion. Although this Court does not know the reasons for the exercise of the Royal Court's discretion in my judgment its conclusion cannot be faulted. It would be wholly inappropriate in the circumstances for this Court to order the determination of a further preliminary issue at this late stage in these proceedings. In so holding I should say that I reject Dr. Kelleher's submission that the only power in the Court to order a preliminary issue arises under the limited provisions of Rule 7/8 of the Royal Court Rules 1992. In my judgment the Court has clear power under at least Rule 6/21 to direct that issues arising in a case, whether of fact or of mixed fact and law, be tried prior to, or separately from, other issues in the case. Because this Court does not know the reasons why the Royal Court refused the application for the determination of a further preliminary issue it is appropriate for me to set out why in my judgment the Royal Court's conclusion was correct. First, even if the proposed preliminary issue were to be resolved in Mr. Murfitt's favour, it would not be determinative of the action or even of a substantial issue in the action. It is clear from the wording of Articles 155 and 141 of the 1991 Law, to which I have already referred, that a petitioner on a just and equitable winding up petition, or on an unfair prejudice petition, does not have to establish that he is a beneficial owner of the relevant shares in order to entitle him to relief. In order to bring such proceedings, and to be entitled to the relevant relief, a petitioner merely has to show that he is a member of the company. As the definition of membership in Article 25 of the 1991 Law makes clear, Mr. Jean, as the registered holder of the 2,494 shares, would clearly qualify in that capacity. Thus although this will obviously be a matter for the trial judge at the hearing of the Representation, the issue as to which of any one, or more, of Mr. Jean, his two sons, or other members of the Jean family are ultimately determined to be the beneficial owner of the Jean family shares under the will or under the intestacy of Mrs. Jean will have little practical effect as to whether the member - currently Mr. Jean - is entitled to the relief sought against Mr. Murfitt in the petition on the grounds of breakdown or unfairly prejudicial conduct.

In my judgment such doubts, if any, as may be raised by the beneficial ownership issue are, in any event, likely to be resolved by the proposed joinder of the two executors of Mrs. Jean's will of personalty who can, through such joinder, represent the interests of all claiming in Mrs. Jean's estate. Accordingly I do not consider that the requirements for a direction for the trial of a preliminary issue as laid down in Carl Zeiss Stiftung -v- Herbert Smith & Co. [1968] 2 All ER 1002 CA and in Tilling -v-

Whiteman [1979] 1 All ER 737 are satisfied in the circumstances of this case.

5 Secondly, given that Mr. Murfitt has already failed on the first preliminary issue raised and given the considerable delay that has already occurred in this litigation, it cannot be right at this late stage, only a month before trial, to delay these proceedings any longer by the determination of a further so-called preliminary issue raising matters which strictly are of no  
10 relevance to Mr. Murfitt, mainly the devolution of Mrs. Jean's estate of personalty.

15 Thirdly, although it will be a matter for the Royal Court when it has the two summonses before it next week, it seems unlikely that the proceedings brought by Mr. Jean will be dismissed at this stage on a summary basis or that the amendment to join Mr. and Mrs. Jean's two sons as executors will only be allowed on the basis that Mr. Jean pays the entire costs of the proceedings to date prior to the determination of the relevant  
20 issues as to beneficial ownership at trial. Accordingly, in my judgment the existence of the summonses provides no basis for the direction of a further preliminary issue at this stage.

25 Fourthly, it is clear that the issue of beneficial ownership of the Jean shares (if, and to the extent that, it is indeed a relevant issue on the Representation at all) is only one of a number interrelated factual issues that will have to be determined by the trial judge on the hearing of the petition. I see no reason to direct that this issue should be heard in isolation from  
30 the remainder of the issues that necessarily arise on the Representation. Accordingly I would dismiss Mr. Murfitt's application for leave to appeal against the Royal Court's refusal to direct a further preliminary issue, namely the question of the beneficial ownership of the Jean shares.

35 So far as Mr. Murfitt's second application is concerned, this in my judgment must also be dismissed. This Court, in its Judgment of 18th April, 1996, has already dismissed Mr. Murfitt's appeal against the Royal Court's decision dated 17th May that he  
40 should pay the costs of the *séparation des biens* hearing on an indemnity basis. In these circumstances this Court has no power to vary the past orders for indemnity costs made in this action and in any event I see no basis for so doing. Accordingly the application made in paragraph two of Mr. Murfitt's summons is  
45 refused.

50 So far as Mr. Murfitt's third application is concerned (namely to stay the enforcement of any order for costs against him until after the determination of his petition for leave to appeal to the Judicial Committee of the Privy Council) I propose that this Court should order a stay of the enforcement of any of the costs orders made against Mr. Murfitt to date in these



proceedings, pending the determination of Mr. Murfitt's application to the Privy Council for special leave to appeal and, if leave is granted, pending the appeal, provided that: first, Mr. Murfitt lodges his petition for special leave not later than 31st  
5 October, 1996; and, second, that he thereafter prosecutes such application for leave to appeal and any subsequent appeal with all due expedition and for that purpose the Representor is to be at liberty to apply to the Royal Court.

10 LE QUESNE, J.A.: I agree.

CALCUTT, J.A.: I also agree.

Authorities.

Royal Court Rules, 1992: Rule 7/8(1), 6/21.

R.S.C. (1995 Ed'n): O.18, r.11; O.33, rr.1-4.

Carl Zeiss Stiftung -v- Herbert Smith & Co. [1968] 2 All ER 1002  
CA.

Tilling -v- Whiteman [1979] 1 All ER 737.

Isaacs & Sons Limited -v- Cook [1925] 2 KB 391.

Ashmore -v- Corporation of Lloyds [1992] All ER.

Companies (Jersey) Law, 1991.